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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 584

YETTA STROMBERG, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

BRIEF OF APPELLANT.

JOHN BEARDSLEY,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

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THE PEOPLE OF THE STATE OF CALIFORNIA.

BRIEF OF APPELLANT.

Citation of Opinion of Court Below.

In compliance with Subdivision *b* of Rule 27, appellant refers to the official report of the opinion delivered in the court below; the opinion has not yet been printed in the bound volumes of the California Appellate Reports; the citation in the Advance Sheets is 62 Cal. App. Decisions, 788.

Statement as to Jurisdiction on Appeal.

In compliance with Subdivision *c* of Rule 27, appellant submits her statement, particularly disclosing the basis on which it is contended this Court has jurisdic-

tion to review, on appeal, the judgment below. Such statement is on file with the Clerk, but because it was typewritten, and printed copies have not been provided, it is presented herewith, as follows:

A.

Statutory Provisions Sustaining Jurisdiction.

Act of February 13, 1925, Chap. 229, 43 Stat. 936, and particularly Section 237 (*a*) of the Judicial Code, as amended by said act.

A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, of treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

An Act in Reference to Writs of Error, Chap. 14, 45 Stat. 54, reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in*

> *Congress assembled,* That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be applicable by appeal.

Section 2 (as amended April 26, 1928, Chap. 440, 45 Stat. 466):

> The statutes regulating the right to a writ of error, defining the relief which may be had therein, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error.

B.

Date of Decree and Date of Application for Appeal.

The decree, order and judgment sought to be reviewed was entered in the Supreme Court of California on July 24, 1930 (R. 19), and in the District Court of Appeal in the State of California in and for the Fourth Appellate District on June 27, 1930 (R. 4).

Appellant's petition for rehearing was denied July 7, 1930 (R. 18).

The application for appeal was presented on September 11, 1930 (R. 19), and allowed September 11, 1930 (R. 21).

C.

Nature of Case and Ruling Below.

This appeal is brought to this Court to test the constitutionality of Section 403*a* of the Penal Code of

California, known as the "Red Flag Law". Appellant contends that the statute violates the 14th Amendment, and particularly the due-process clause.

The statute reads as follows:

> "SECTION 403*a*. Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character, is guilty of a felony."

The Superior Court of the State of California in and for the County of San Bernardino, in which the case was tried, overruled appellant's demurrer, in the argument of which the constitutional question was raised (R. 2, Stipulation of Facts, R. 24, 26).

The District Court of Appeal of California, in its decision affirming the conviction of appellant, held that the statute is not repugnant to the Constitution (R. 4, 8), and the Supreme Court of California denied appellant's petition to that Court to hear and determine the cause after judgment in the District Court of Appeal.

D.

Cases Applicable to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Martin vs. Hunter, 4 L. Ed. U. S. 97;

Hamblin vs. Western Land Company, 37 L. Ed. U. S. 267;
Re Buchanan, 39 L. Ed. U. S. 884;
Kipley vs. Illinois, 42 L. Ed. U. S. 998;
Whitney vs. California, 71 L. Ed. U. S. 1095.

Those cases established the jurisdiction of this Court to review the judgment of State courts on Federal constitutional questions on writs of error.

As set forth in subdivision A hereof, the statutes applicable to writs of error are now applicable to the appeal which the new section substitutes for the writ of error.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of the foregoing.

Respectfully submitted,

JOHN BEARDSLEY,
Counsel for Appellant.

Statement of the Case.

In compliance with subdivision *d* of Rule 27, the following statement of the case is respectfully submitted:

Primarily the purpose of this appeal is to test the constitutionality of Section 403*a* of the Penal Code of California, commonly referred to as the California Red Flag Law and set out in full in subdivision *C* of the foregoing statement as to jurisdiction on appeal. So far as we know, the constitutionality of this statute or of any similar statute never has been determined by this Court. Although the law was enacted in 1919, this prosecution, instituted in the Superior Court of the State of California in and for the County of San Bernardino by the filing of an information on August 26, 1929 (R. 1, 2), is the first and only prosecution ever instituted under this statute. California's Criminal Syndicalism Law, also enacted in 1919, was before this Court in *Whitney vs. California*, 274 U. S. 357; 71 L. Ed. 1095, and its constitutionality was upheld. The New York Criminal Anarchy Statute, similar, but not identical, in content and phrase, was upheld as to its constitutionality by this Court in *Gitlow vs. New York*, 268 U. S. 652; 69 L. Ed. 1138. Both of those statutes specifically denounce and prescribe punishment for the employment or advocacy of force and violence as a means to political or industrial change. The statute now before the Court differs from the statutes reviewed in the *Whitney* and *Gitlow* cases in that it does

not mention force or violence, but is all inclusive in its condemnation of the display of a flag as an emblem of opposition to organized government, or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character.

The Facts.

A stipulation of facts was filed January 20, 1931, and is printed at pages 24, 25, and 26 of the record. More briefly stated, they are as follows:

In the summer of 1929 about 40 children, between 10 and 15 years of age, of workingmen's families were in camp on a ranch property in the foothills of the San Bernardino Mountains, a few miles from the town of Yucaipa, in San Bernardino County, California. One man and six women were the only adults at the camp, which was promoted and maintained by a so-called camp conference, a delegate body of 24 representatives of half a dozen organizations, principally Communist in their affiliations and purposes. One of those we have classified as adults was the appellant Yetta Stromberg, an American girl, born of Russian immigrant parents at Cleveland, Ohio, and a citizen of the United States. She celebrated her 19th birthday at the camp. She was a camp director and had charge of the educational hour in which the children participated daily. Miss Stromberg taught the children history and economics, class consciousness, the solidarity of the workers, and the theory that the workers of the world are of one blood and brothers all.

Appellant was the only person at the camp who was a member of the camp conference. She was a member

of the Young Communist League, an international organization affiliated with the Communist Party, whose members are too young for membership in the party. She was a graduate of Roosevelt High School in Los Angeles, and had had a year as a student at the University of California, in Los Angeles.

In that summer of 1929 she was actively engaged in communist agitation and propaganda work. At the camp she supervised and directed the children in their ceremony of raising a flag, which was a camp-made reproduction of the flag of Soviet Russia, which was also the flag of the Communist Party in the United States. Miss Stromberg testified that the oneness of blood of the Workers of the World was symbolized by the red background, upon which was superimposed a likeness of a sickle, representing the farmers, and a hammer, representing the industrial workers. Several days in succession, at about 7 o'clock in the morning, the children, under the direction of Miss Stromberg, stood at salute beside their beds in the open air while the flag was raised on an improvised flagpole upon a high spot a few hundred feet from the childrens' beds. In unison the children recited their pledge, as follows:

> "I pledge allegiance to the Workers' red flag,
> And to the cause for which it stands;
> One aim throughout our lives,
> Freedom for the working class."

The flag was then taken down and put away until the next morning.

A library was maintained at the camp, containing a large number of books, papers, and pamphlets, includ-

ing much radical communist propaganda, specimens of which are quoted in the opinion of the State Court. A number of the books and pamphlets bore the name of appellant in pen or pencil, some in her own handwriting, and others in the writing of an undisclosed person. Appellant admitted ownership of a number of them. She testified, however, that none of the literature in the library, and particularly none of the exhibits containing radical communist propaganda, was in any way brought to the attention of any child or of any other person, and that no word of violence of anarchism or sedition was employed in her teaching of the children. There was no evidence to the contrary. There was evidence, however, that programmes and "stunts" were put on in the evenings, including playlets satirizing and attacking capitalism, although none of them expressed opposition to organized government or advocacy of anarchism or sedition.

An 11-year-old girl testified that they were addressed by a visiting speaker. When asked, "What did he say about the Government of the United States?" she replied, "He said he didn't want a government, or something like that. I am not sure."

There was also received in evidence an excerpt from the minutes of the camp conference which promoted and managed the camp to the effect that books and pamphlets were needed at the camp library, and that the secretary was to try and get some from the Communist Party headquarters in Los Angeles.

The study hour was only one feature of the camp activities. The children played baseball and other games, hiked in the mountains, were read to from Huckleberry Finn and other stories, had frequent showerbaths, and occupied their time generally about as any group of children on vacation would.

On or about August 1, 1929, the camp was "raided" by the District Attorney and Sheriff and some citizens of San Bernardino County. Quantities of communist books, papers and pamphlets were seized and many inflammatory excerpts were read aloud to the jury at the trial of appellant and the six other adults upon the charges of violating and conspiring to violate Section 403*a* of the Penal Code. All of the evidence that the flag stood for opposition to organized government or anarchism or sedition came from this communist literature confiscated at the camp.

Miss Stromberg assumed at the trial all responsibility for the display of the flag, which she testified was not raised as an emblem of opposition to organized government or as a stimulus to anarchistic action or as an aid to propaganda that is of a seditious character. She said it was the flag of Russia and of the Communist Party in America. And that fact was and is undisputed.

Appellant was found guilty by the jury on both counts of the information, the first count charging actual display of the flag in violation of the law and the second count charging conspiracy so to violate the law. All the other defendants were acquitted on the first count, and five others besides appellant were found

guilty on the conspiracy count. The District Court of Appeal reversed the convictions of all on the conspiracy count, so that appellant is the only remaining defendant in the case, the judgment against her on the first count having been affirmed.

Specification of Errors.

In compliance with subdivision *e* of Rule 27, we submit the following specification of such of the assigned errors as are intended to be argued. The assignment of errors is printed at pages 19, 20 and 21 of the record. Summarized, they are:

That the District Court of Appeal erred in holding that Section 403*a* of the Penal Code of California does not:

(1) Deprive appellant of her liberty without due process of law;

(2) Deny appellant the equal protection of the laws;

(3) Abridge the privileges or immunities of citizens of the United States, of whom appellant is one;

(4) As construed and applied in this case, deprive appellant of her liberty without due process of law;

(5) As construed and applied in this case, deny to appellant the equal protection of the laws;

(6) As construed and applied in this case, abridge the privileges or immunities of citizens of the United States, of whom appellant is one.

Further, and more specifically, as set out in the statement of points relied upon (R. 22, 23), appellant con-

tends that said Section 403*a* inherently, and as construed and applied in this case, violates the 14th Amendment of the Constitution of the United States, in that it:

(1) Abridges the privileges and immunities of the citizens of the United States, of whom appellant is one.

(2) Deprives appellant of her liberty without due process of law.

(3) Denies to appellant, a person within its jurisdiction, the equal protection of the laws.

(4) Penalizes, by imprisonment, the display in a public place or in a meeting place of the flag of the Communist Party of the United States, a legally constituted and functioning political party, with which appellant, as a citizen of the United States, is affiliated.

(5) Deprives this appellant of her political liberty and liberty of expression and freedom of speech.

(6) Punishes by imprisonment this appellant, a citizen of the United States, for her adherence to a legally organized and functioning political party, namely, the Communist Party.

(7) Punishes by imprisonment this appellant, a citizen of the United States, for the display in a public place, or a meeting place, of the flag of Soviet Russia, a Government with which the United States is at peace.

(8) Is so broad and inclusive in its terms as to penalize the display of a flag as an emblem of peaceable and orderly as well as violent opposition to or-

ganized government, or of philosophical and non-violent as well as violent anarchistic action, or as an aid to seditious propaganda; and is, therefore, void for uncertainty.

ARGUMENT.

It is respectfully submitted that this case is important in that it affords opportunity to this Court to declare anew, and to protect and enforce, the American tradition and constitutional guaranty of freedom of speech and of assembly.

An American citizen has been sentenced to the penitentiary for the crime of displaying the flag of a legally constituted and functioning political party, which is also the flag of a nation with which the United States is not at war. The Workers' (Communist) Party had a ticket on the ballot in the general election of 1928 and polled about 50,000 votes for its candidates, Foster and Gitlow, for President and Vice-President. Appellant was affiliated with that party, though not a member. She was a member of the Young Communist League, an international organization affiliated with the Communist Party, whose members were too young for membership in the party itself (R. 24). She was actively engaged in Communist agitation and propaganda work (R. 24). She was an internationalist. She believed in the government of Soviet Russia, and she expressed that belief by participating in the display of a flag of Russia and of the Communist Party at the children's summer camp in the foothills where she was director of the educational and propagandist activities. She was convicted of displaying a flag in a public place

(a summer camp in the remote foothills of San Bernardino County, California) as an emblem of opposition to organized government, and as an invitation and stimulus to anarchistic action, and as an aid to propaganda that is of a seditious character.

Section 403a, Calif. P. C., inherently and as here applied, violates the 14th Amendment, and particularly the due-process clause.

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. 14th Amendment to the Constitution of the United States.

Freedom of speech and of the press—which are protected by the 1st Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due-process clause of the 14th Amendment from impairment by the states.

Gitlow vs. New York, 268 U. S. 652; 69 L. Ed. 1138;

United States vs. Cruikshank, 92 U. S. 542, 554; 23 L. Ed. 588, 592;

Allgeyer vs. Louisiana, 165 U. S. 578, 589; 41 L. Ed. 832, 835; 17 Sup. Ct. Rep. 427;

Butchers' Union, S. H. & L. Co. vs. Crescent City, L. S. L. & S. H. Co., 111 U. S. 746, 762;

28 L. Ed. 585, 588; 4 Sup. Ct. Rep. 652;
Coppage vs. Kansas, 236 U. S. 1, 14; 59 L. Ed. 441, 446; L. R. A. 1915C, 35 Sup. Ct. Rep. 240;
State vs. Julow, 129 Mo. 172; 29 L. R. A. 257; 50 Am. St. Rep. 443; 31 S. W. 781;
Block vs. Schwartz, 27 Utah, 396; 65 L. R. A. 308; 101 Am. St. Rep. 971; 76 Pac. 22; 1 Ann. Cas. 550; Freund Pol. Power, Sec. 478, p. 513;
Patterson vs. Colorado, 205 U. S. 454; 51 L. Ed. 879; 27 Sup. Ct. Rep. 556; 10 Ann. Cas. 689;
State ex rel. Ragan vs. Junkin, 85 Neb. 1; 23 L. R. A. (N. S.) 839; 122 N. W. 473;
Fox vs. Washington, 236 U. S. 273; 59 L. Ed. 573; 35 Sup. Ct. Rep. 383;
Gilbert vs. Minnesota, 254 U. S. 325, 332; 65 L. Ed. 287, 290; 41 Sup. Ct. Rep. 125;
Neelley vs. Farr, 61 Colo. 510; 158 Pac. 458;
Twining vs. New Jersey, 211 U. S. 78; 96, 97; 53 L. Ed. 97, 104, 105, 29 Sup. Ct. Rep. 14.

Outstanding among the decisions of this Court touching the constitutionality of statutes tending to abridge the freedom of speech are *Schenck vs. U. S.,* 249 U. S. 47; 63 L. Ed. 470; 39 Sup. Ct. Rep. 247, and *Gitlow vs. New York, supra.*

In the Schenck case, the unanimous Court, speaking through Mr. Justice Holmes, established as the test of constitutionality of laws affecting freedom of speech the clear and present danger principle. The prosecution there was for conspiracy to violate the Espionage Act, for conspiracy to use the mails for the transmission of matter declared to be non-mailable by law

and for the actual use of the mails for that purpose. On appeal it was contended that the statute was violative of the constitutional guaranty of freedom of speech. The Supreme Court said:

> "We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. * * * The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right."

The clear and present danger in the Schenck case was that the distribution of circulars would cause insubordination, etc., in the military and naval forces of the United States and obstruct the recruiting and enlistment services of the United States when the United States was at war with the German Empire.

In the two counts charging conspiracy, the conspiracy itself, and not the publication and distribution of circulars, constituted the gravaman of the offense. Indeed, it might reasonably be argued that the principle of freedom of speech was involved very little or not at all. It was not the printed words in the circulars that

the prosecution was intended to punish. The words were merely evidentiary of the conspiracy to obstruct the Government in the conduct of the war. All courts, and we presume all intelligent minds, recognize that freedom of speech is not absolute. Persons accused of conspiracy to commit robbery might be shown to have talked a great deal among themselves about the details of their plan. Such evidence, supported by evidence of an overt act, would constitute the proof of the conspiracy charged. No one could claim that the principle of freedom of speech would afford any protection to the words thus spoken by criminal conspirators. Similarly, the printed words of the Schenck circulars were held to be evidence of the conspiracy charged.

In *Gitlow vs. New York, supra,* the prosecution was brought under the New York Criminal Anarchy statute, which had been in force many years before the World War. This Court in that case modified and restricted the clear and present danger doctrine of the Schenck case. It was held that the New York statute is not an arbitrary or unreasonable exercise of the police power of the State, unwarrantably infringing the freedom of speech or press, and, therefore, its constitutionality was sustained. The Court said (268 U. S., p. 670):

> "* * * when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any

specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional, and that the use of the language comes within its prohibition."

Unquestionably, as to the Espionage Law which was involved in the Schenck case, the legislative body (Congress) had determined that clear and present danger existed. As to the New York statute, there was in the law itself no suggestion that clear and present danger existed at the time of its enactment. The Supreme Court said:

"There, if it be contended that the statute cannot be applied to the language used by the defendant because of its prohibition by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such cases, it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect were to bring about the substantive evil which the legislative body might prevent." (Citing cases.)

"And the general statement in the Schenck case (p. 52) that the 'question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring

> about the substantive evils,'—upon which great reliance is placed in the defendant's argument—was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."

Without criticising the appropriateness of the language just quoted to the situation in the Gitlow case, we respectfully suggest that there are cases, and the case at bar is one of them, in which the quoted language would not meet the needs of statutory interpretation and construction. Section 403*a* of the Penal Code of California, which is the basis of this prosecution and appeal, provides that it is a felony to display a flag as a sign, symbol, or emblem of opposition to organized government, or as an invitation or stimulus to anarchistic action, or as an aid to propaganda that is of a seditious character. Can it reasonably be said that because the legislature had determined that manifestation of opposition to organized government is felonious, that determination is final and binding upon the courts, and removes the statute from the protection of the freedom of speech? We think that there is no doubt that the phrase "freedom of speech" is to be construed as freedom of expression. As said by the District Court of Appeal of California in its opinion sustaining the constitutionality of this statute (R. 7):

> "The part of the 14th Amendment which might be applicable to the case is the provision

> that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States'. Among these privileges undoubtedly, are the rights of free speech and of lawful assembly, which are guaranteed by our State constitution. No matter how revolutionary, in the general sense, a doctrine may be, of our present form of Government, if its adoption in practice is advocated by peaceful and constitutional means—and our constitutions, State and National, provide the means—the open and public advocacy of such doctrine cannot be interfered with."

And again (R. 10) that Court said:

> "It (opposition) might be construed to include the peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high minded and patriotic, which did not agree with the one in power. It might also be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations."

The Court also said (R. 10):

> "If opposition to organized government were the only act prohibited by this section, we might be forced to agree with appellant" (that the statute is unconstitutional).

We submit that this law, making opposition to organized government a crime, is not to be sustained upon the ground that the legislature, by enacting it, had determined that the natural tendency and probable

effect of such opposition were to bring about the substantive evil which the legislative body might prevent.

Quite different is the legal situation presented by the California Criminal Syndicalism Law, whose constitutionality was upheld (Statutes 1919, Chap. 188, p. 281) by this Court in *Whitney vs. California*, 274 U. S. 357, 71 L. Ed. 1095. There the legislature by its enactment had determined the then existence of clear and present danger. The Act recites in Section 4:

> "Inasmuch as this act concerns and is necessarily to the immediate preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place in this state advocating, teaching, and practicing criminal syndicalism, this act shall take effect upon approval by the Governor."

The California Criminal Syndicalism Law and the California Red Flag Law (Penal Code 403*a*) are sister statutes. Both were enacted and became effective in 1919. By adding Section 4 to the Syndicalism Law the legislature disclosed that they had in mind the advisability, if not the necessity, of announcing their determination that clear and present danger existed in the State, and that the danger must be met by statute. They enacted no such clause, and made no such declaration as to the Penal Code Section 403*a*, here under consideration. May we not reasonably conclude that the determination, that clear and present danger existed, was omitted from Section 403*a* purposely, and for the reason that the legislators believed

there was no clear or present danger in the display of a flag as an emblem of opposition to organized government or of anarchism, or of sedition? May not the maxim *inclusio unius est exclusio alterius* apply? Whether or not the maxim is pertinent, we must determine otherwise than by legislative enactment whether, in the remote recesses of the San Bernardino foothills, in August 1929, there existed clear and present danger that the raising of the flag of Russia and of the Communist Party in the United States would bring about a substantive evil (force and violence against the Government) which the legislative body had the constitutional right to prevent. We find difficulty in imagining a time and place or circumstances in which any sort of danger could be conceived as less clear or more remote. Forty children and seven adults, vacationing in the woods on a ranch, miles from the nearest town, one mile from the nearest public highway, and approached by a private road passing through two gates, can scarcely be pictured as a menace to the stability and life of this Republic.

We submit that Section 403*a* of the Penal Code of California is unconstitutional in that it violates the right of freedom of expression as guaranteed by the due-process law of the 14th Amendment.

From other viewpoints the constitutionality of this statute is equally questionable.

Section 403a is Void for Uncertainty.

This statute not only penalizes the display of a flag as an emblem of any sort of opposition to organized

government. It also brands as a felony the display of a flag as an invitation or stimulus to anarchistic action. All educated men know that there are at least two schools of anarchism. One is the school of violence. Its adherents would dynamite government buildings and assassinate public officers. But there is also a school of non-violent anarchists.

Webster in his definition of the word "anarchism" assigns to that school "the theory that formal government of any kind is unnecessary and wrong in principle; the doctrine and practice of anarchists".

And in defining the word "anarchist", Webster gives first place to this definition, "an advocate of anarchism as a social and political theory".

"Anarchy" Webster defines as "(1) a social theory advocated especially by Pierre Joseph Proudhon (1809-1865), that holds formal government to be unnecessary for the maintenance of order and therefore unjustifiable, regarding individual liberty as the only just rule of society. (2) Want of government; a state of society in which there is no law or supreme power * * *"

"Anarchistic" is defined by Webster as "pertaining to anarchism, favoring or promoting anarchy."

This Court recognized the difference between philosophical anarchism and the anarchism of violence in *United States ex rel. Turner vs. Williams* (1904), 194 U. S. 279; 48 L. Ed. 979; 24 Sup. Ct. Rep. 718, holding that freedom of speech and of the press was not infringed by the Immigration Act of 1903 for the exclusion and deportation of alien anarchists, whether the

statute was construed as applying to persons whose opposition to all organized government was proposed as a political ideal, or simply as including those who advocated the forcible overthrow of government or assassination of officials.

Thus we see that anarchistic action is not at all necessarily violent action, and does not necessarily invite the use of arms or weapons of any kind. In other words, "anarchistic action" is a term broad enough to include violent and non-violent action. "Anarchistic action" might be nothing more or less than political action, that is, action on behalf of the promotion of the social theory advocated by Proudhon, which holds that formal government is unnecessary for the maintenance of order and, therefore, unjustifiable.

Section 403*a* thus brands and punishes as criminal the display of a flag as an invitation or stimulus to anarchistic action, which may be no more than political or theoretical agitation of their cause by those who believe that human beings ought, or may, some time reach that state of civilization in which formal government will be unnecessary and unjustifiable.

As to its second clause, then, we contend that Section 403*a* violates the right of freedom of expression, which includes freedom of speech and freedom of opinion, and that it is void for uncertainty.

As to the final clause of Section 403*a*, penalizing the display of a flag "as an aid to propaganda that is of a seditious character", we contend also that it is void for uncertainty, and because it punishes mere words independently of acts. In this clause, as in both its

other clauses, the statute is so indefinite as not to enable it to be known what is forbidden, and therefore amounts to a delegation by the legislature of the legislative power to courts and juries to determine what acts, or what words, should be held to be criminal and punishable. It leaves it to jurors, in radical cases, swayed by their emotions and influenced by an often hysterical public opinion, to decide whether the printed or spoken words in a given case amount to propaganda that is of a seditious character. Professor Zechariah Chafee, Jr., of Harvard Law School, in his admirable book "Freedom of Speech", says, at page 170, that the crime of sedition was abolished by the 1st Amendment. We suggest that such abolition is effective against the States, as well as against the Federal Government. It is true that State sedition laws in some jurisdictions have been upheld by the State courts of last resort, but we point out that in all such statutes there was specific mention of force and violence as characterizing the sort of seditious utterance that was declared unlawful.

The Connecticuit Sedition Law, Chap. 312 of the Public Laws of 1919, was held constitutional in *State vs. Sinohuk,* 96 Conn. 615, 115 Atl. 33. The statute forbate, and the information charged, the public display of disloyal, scurrilous or abusive matter, *with force of arms,* concerning the government, etc.

Similarly, the Iowa Sedition law was held constitutional in *State vs. Gibson* (1919), — Iowa —, 174 N. W. 34. But there again the statute prescribed

punishment for anyone who should "excite an insurrection by sedition", or should attempt by writing, speaking, or other means to do this, or who should by any means, including speech and writing, advocate the *subversion and destruction by force* of the government of the State or of the United States.

In Montana, the sedition statute of 1918 has been upheld. That is specifically a war-time statute, using the language "whenever the United States is engaged in war", and the Montana court's rulings are in line with this Court's decisions in the Espionage Act cases.

But the State Court decisions are to the contrary in cases where the statutes do not specifically inveigh against the use or advocacy of force and violence against the Government. In *State of New Mexico vs. Diamond*, 202 Pac. 988, a conviction of unlawfully and feloniously attempting to incite revolution and opposition to the State and Federal governments was reversed upon the ground that the New Mexico statute was unconstitutional and void for uncertainty.

In *State vs. Gabriel*, 95 N. J. 337, 112 Atl. 611, the Supreme Court of New Jersey held unconstitutional Section 3 of that State's sedition act, prohibiting membership in any society formed for the purpose of inciting, abetting, promoting or encouraging hostility or opposition to the Government of the United States, or of the State of New Jersey, for the reason stated that the section would apply to any citizen who sought a change in the form of the government by a most peaceful means.

Nowhere have we been able to find decisions upholding statutes which penalize *all* opposition to organized government, or stimulating or inviting *all* or any kinds of anarchistic action, or *all* kinds of "propaganda that is of a seditious character."

For other decisions holding statutes void for uncertainty see *United States vs. Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516, and cases there cited.

Section 403a is arbitrary and unreasonable, and therefore void.

Although the State is primarily the judge of regulations required in the interest of public safety and welfare, its police statutes may be declared unconstitutional where they are arbitrary and unreasonable attempts to exercise the authority vested in the State in the public interest. *Gitlow vs. New York, supra; Fiske vs. Kansas*, 274 U. S. 380; 71 L. Ed. 1108; 47 Sup. Cr. Rep. 655. We submit that this statute is arbitrary and unreasonable in that it penalizes *all* opposition to organized government, *all* anarchistic action, and *all* seditious propaganda, as synmbolized by a flag or other emblem. The Supreme Court of California passed upon a similar proposition in *In re Hartman*, 182 Cal. 447, wherein the constitutionality of a Los Angeles municipal red-flag ordinance was in question. The ordinance forbade the display of a flag "representative of any nation * * * or organized effort of any nature which in its purposes * * * espouses for the government of the United States * * * principles or theories of government antagonistic to

the constitution and laws of the United States of America, or to the form of government thereof as now constituted * * *." In holding the ordinance unconstitutional, the California Court said:

> "The language of the ordinance is so broad and comprehensive as to render criminal the display or possession of the flag, or emblem of a peaceful organization or society which espoused or advocated amendment of the federal constitution or of our form of government, national or state, in respects admittedly proper from a legal point of view, although giving rise to differences of opinion as to such amendment or change * * *. Nothing would seem to be more certain than that the inhabitants of the United States have both individually and collectively the right to advocate peaceable changes in our constitution, laws or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis. And it seems equally certain that an organization peaceably advocating such changes may adopt a flag or emblem signifying its purpose, and that the display or possession of such flag or emblem cannot be made an unlawful act."

It is submitted that, in view of the Hartman case decision, Section 403*a* may properly be characterized as arbitrary and unreasonable, and should have been held void upon that ground by the appellate Court below. We suggest also that the refusal of that Court to follow the Hartman decision in the case at bar amounted to a denial of due process.

If Section 403a is unconstitutional as to one or more, though not all, of its clauses, the entire statute is unconstitutional as construed and applied in this case, and the judgment must be reversed.

The District Court of Appeal held substantially that Section 403*a* is unconstitutional in so far as it penalized the display of a flag as an emblem of opposition to organized government, but ruled that as to the clauses touching anarchistic action and seditious propaganda, the statute is not violative of the 14th Amendment.

While we insist that the statute in its entirety is unconstitutional, we point out that even if this Court were to hold that only the opposition to organized government clause is violative of the fundamental law, the judgment herein must be reversed because this statute as construed and applied in this case is unconstitutional. The trial Court in its instruction No. 17 (R. 2) charged the jury that they need not find that the defendants displayed the flag for all three of the purposes enounced by the statute, in order to convict, but that "it is only necessary for the prosecution to prove to you beyond a reasonable doubt that said flag was displayed for any one or more of the three purposes mentioned in the Information (which was in the language of the statute) . . . Proof, beyond a reasonable doubt of any one or more of the three purposes is sufficient to justify a verdict of guilty under count one of said Information."

Who is to say, and how can anyone know, whether the jury, in returning its verdict of guilty, found the defendant Stromberg guilty under count one of dis-

playing a red flag "as an emblem of opposition to organized government", or "as an invitation and stimulus to anarchistic action", or "as an aid to propaganda that is and was of a seditious character"?

Is this Court warranted in concluding that because Section 403*a* of the Penal Code is unconstitutional so far as the phrase "opposition to organized government" is concerned, the jury must have meant to find the defendant and appellant Stromberg guilty of displaying the flag "as an invitation and stimulus to anarchistic action" or "as an aid to propaganda that is and was of a seditious character"?

We think the rule is directly to the contrary. The verdict is based upon the information, which charges that the flag was raised for all three of the purposes named, and upon the evidence, which was received in support of the charge as to all three purposes. As to one of the purposes, namely, displaying the flag as an emblem of opposition to organized government, the statute is clearly unconstitutional. As to that clause the information is bad. The good and the bad are inseparable. The presumption must be that as all three clauses were held good by the trial court, and evidence received in support of all, the judgment is upon all three, hence that it is erroneous.

People vs. Smith, 103 Cal. 563, 567;
People vs. Mitchell, 92 Cal. 590.

A decision of a State Court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under Section 237 of the Judicial Code.

Fiske vs. Kansas, 274 U. S. 380; 71 L. Ed. 1108; 47 Sup. Ct. Rep. 655.

Dahnke-Walker Milling Co. vs. Bondurant, 257 U. S. 282; 66 L. Ed. 239, 242; 42 Sup. Ct. Rep. 106.

Since the abolishment of the writ of error by statute, the remedy is by appeal.

The inquiry, then, is whether the statute is constitutional as applied and enforced in respect of the situation presented.

Fiske vs. Kansas, supra, and cases there cited.

In the case at bar the State Court applied and enforced Section 403*a* against appellant. That there was a distinct and timely existence that if so applied the statute was void under the Federal Constitution, appears from the statement in the stipulation of facts that a general demurrer to the information was overruled, and that criminal procedure in California permits the raising of constitutional questions by general demurrer, and that in the argument on demurrer, counsel for appellant contended that the statute was vio-

lative of the 14th Amendment to the Federal Constitution, and that the demurrer was overruled (R. 25, 26).

This should have been included in the statement as to jurisdiction, *supra*, but the statement there printed was copied from the typewritten statement on file, and we did not deem it proper to make the addition there in view of our statement that it was copied from the typewritten statement on file.

The construction of the statute by the District Court of Appeal of California is binding upon this Court.

Chas. Wolff Packing Co. vs. Court of Industrial Relations, 267 U. S. 552; 69 L. Ed. 785; 45 Sup. Ct. Rep. 441;

Dorchy vs. Kansas, 272 U. S. 306; 71 L. Ed. 248; 47 Sup. Ct. Rep. 86.

In *Fiske vs. Kansas*, this Court held that the Kansas Criminal Syndicalism Law, as applied in the State Court, was "an arbitrary and unnecessary exercise of the police power of the State, unwarranted infringing the liberty of the defendant in violation of the due-process clause of the 14th Amendment." We submit that the same reasoning applies here, and the same rule should govern. The trial Court received in evidence, over the objection of defendants, a mass of communist literature, and permitted the prosecutor to read to the jury for hours such inflammatory excerpts as are set forth in the opinion of the appellate Court below (R. 4; 15, 16, 17, 18). Perhaps as good a sample as any other is this:

> "Communists do not think it necessary to conceal their views and intentions. They openly

declare that their goal can be achieved only by the violent overthrow of the whole of the present social system: Let the dominant classes tremble before the communist revolution. The proletariat has nothing to lose but its chains; It has the whole world to gain; Workers of all countries, unite."

Thus the trial Court applied Section 403*a* of the Penal Code of California to enable a jury of patriotic and excited American citizens to convict of a felony a 19 year old American girl for displaying in a remote summer camp, miles from the nearest city or town, and a mile from the nearest highway, the flag of Soviet Russia and of the Workers (Communist) Party, with which this young woman was affiliated. As applied here, this statute has enabled a jury to find that the flag of Russia, perhaps the most highly organized government in the world, is the emblem of opposition to organized government, and of anarchism, which is the antithesis of organized government, and of sedition, the crime which our forefathers abolished by the 1st Amendment to the Constitution, and which the Congress abhorred so much that it appropriated money to pay back the fines which had been paid for violation of the law. Not all battles are fought upon the field of armed conflict. A battle of another sort is being fought throughout the United States today for the preservation of the fundamental liberties of the people, warranted to them, in the Bill of Rights in the Amendments to the Federal Constitution. In time of war

those rights were flouted by the majority, and restricted and curtailed by the Government, through statutes and the decisions of the courts. But that time has passed, and we have been all too slow in getting "back to normalcy". California, among all the States, has been notably backward in restoring to its people the rights which always have been theirs, but which they had to forego, in the interest of the preservation of the country itself, in time of war.

We respectfully submit that it is the duty of the courts, and theirs the opportunity, to restore to the people the fundamental and traditional right of freedom of expression.

We respectfully submit that the judgment should be reversed.

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